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Supreme Court of the United States

October Term, 1996

METRO-NORTH COMMUTER RAILROAD,
Petitioner,

vs.

MICHAEL BUCKLEY,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* DEFENSE RESEARCH INSTITUTE AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETIONER

James M. Doran, Jr.
Counsel of Record
Mark S. LeVan
E. Frances Coughlin
Sarah C. Hardison
MANIER, HEROD, HOLLABAUGH & SMITH
First Union Tower, Suite 2200
150 Fourth Avenue North
Nashville, TN 37219-2494
(615) 244-0030

Attorneys for Amici Curiae
Defense Research Institute and
National Association of Manufacturers

Jan S. Amundson
Quentin Riegel
National Association of Manufacturers
2331 Pennsylvania Avenue, N.W.
Suite 1500-North Lobby
Washington, DC 20004-1790
(202) 637-3000

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INTEREST OF THE AMICI CURIAE

The Defense Research Institute ("DRI") is an organization with members throughout the United States numbering in excess of 20,000. It seeks to advance the cause of the civil justice system in America by insuring that the concerns of the defense bar and potential defendants are properly and adequately represented. These objectives are accomplished through the publishing of scholarly material, educating the bar by conducting seminars on specialized areas of law, and through testimony before Congress on select legislation impacting the civil justice system. The Defense Research Institute provides a forum for the networking of state and local defense organizations who share a concern for the proper and efficient operation of the civil justice system.

The National Association of Manufacturers ("the NAM) is the nation's oldest and largest broad-based industrial trade association. Its more than 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately eighty-five percent of all manufacturing workers and produce over eighty percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with the NAM through its Associations Council and National Industrial Council.

The Defense Research Institute and National Association of Manufacturers are interested in the outcome of this case because of the potentially large number of claims it will affect. If this Court allows the lower court's decision to stand, the end result will be that future litigants will rely upon the Second Circuit's alarming decision to try to expand tort liability in other than just FELA cases, and the door to subjective claims of emotional distress will be thrown wide open.[1]

Written consent to the filing of this brief of Amici Curiae was granted by all parties.

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[1] *According to the Connecticut Law Tribune, the Second Circuit's ruling that "workers could sue the railroad for asbestos exposure—even though they may be years from falling ill" will have a tremendous effect on American tort law. Steven Fromm, The Snowmen of Grand Central, Conn. Law Tribune, Apr. 15, 1996, at 1. The article states, "Attorney's [sic] specializing in asbestos and product liability law in Connecticut and across the country assert that the ruling is a landmark decision that may open the door for asbestos exposure cases—and other product liability cases—throughout the country." Id. The article goes on to report that thousands of cases (totaling 35,000 to 40,000) involving members of the Merchant Marine who charge that they were exposed to asbestos during their service over the years have been consolidated in the U.S. District Court in Philadelphia. Id.*

SUMMARY OF ARGUMENT

The Petitioner seeks reversal of an opinion of the Second Circuit holding that a plaintiff who was exposed to asbestos but had no physical injury was entitled to damages for emotional distress and medical monitoring on the theory he was in the "zone of danger." Petitioner raises four questions for consideration. The provisions of the Federal Employers Liability Act and recovery under that Act are set forth persuasively in the Petitioner's Brief and will not be addressed here. Rather, this Brief will focus on the common law requirements of the "zone of danger" test for a purely emotional injury. It will also address the need for this Court to recognize the common law standards established to test the validity and extent of emotional injury claims: (a) physical manifestation; (b) seriousness; and (c) medical or scientific evidence.

While the zone of danger test adopted by this Court in *Consolidated Rail Corp. v. Gottshall*, 114 S.Ct. 2396 (1994) addresses who may make a claim, the Second Circuit opinion demonstrates that the Court should go further and address the minimum requirements for the type of claims that are permitted.

I. THE SECOND CIRCUIT INCORRECTLY EXPANDED THE "ZONE OF DANGER" TEST DEFINED BY THIS COURT IN GOTTSHALL

After reviewing several theories, this *Court in Consolidated Rail Corporation v. Gottshall*, 114 S.Ct. 2396 (1994) adopted the "zone of danger" test "as delimiting the proper scope of an employer's duty under FELA to avoid subjecting its employees to negligently inflicted emotional injury." Id. at 2410. This Court concluded that the "zone of danger" test best reconciles common law considerations and FELA jurisprudence. Id. Although at the time FELA was enacted, most of the major industrial states applied the physical impact test, id. at 2406, it was noted that the "zone of danger" test was somewhat less restrictive and therefore more consistent with the broad remedial goals of the Act. Id. at 2410. However liberal the "zone of danger" test may be interpreted, it is submitted that the test's application must still be restricted by the common law policies underlying its necessity and that the "zone of danger" test is itself a restriction upon the recovery for emotional injury. Mere exposure to a potentially harmful substance

does not give rise to a cause of action for negligent infliction of emotional distress.[2]

It is well established that FELA recognizes a right to recover for negligent infliction of emotional distress, but because of the threat of a flood of imagined or falsified claims and the imposition of liability for highly remote consequences of a negligent act, courts originally placed significant limitations, through tests and rules, on the right of recovery . Id. at 2405 (quoting *Maloney v. Conroy*, 208 Conn. 392, 397-398, 545 A.2d 1059, 1061 (1988)). Unfortunately, the Second Circuit lost sight of the "limiting" aspect of these tests and rules.

Limitations, like the "zone of danger" test, were created to help define one's duty under the law, but the Second Circuit's opinion allowing recovery has so muddied the interpretational waters of the limitations as to render the average individual helpless in a sea of potential liability. As a result, some courts, like the Second Circuit in this case, have inappropriately established liability under the "zone of danger" test in situations to which the common law did not intend the test to apply.

A. THE "ZONE OF DANGER" TEST WAS INTENDED TO APPLY TO SITUATIONS INVOLVING IMMEDIATE RISK OF PHYSICAL HARM TO A REASONABLE PERSON WHO CONTEMPORANEOUSLY FEARED FOR HIS OR HER SAFETY.

As this Court stated in *Gottshall*, the "zone of danger" test was founded on the "realization that a near miss may be as frightening as a direct hit[.]'" *Gottshall*, 114 S.Ct. at 2406 (quoting Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm - A Comment on the Nature of Arbitrary Rules*, 34 U.Fla.L.Rev. 447, 488 (1982)). The test broadened the scope of duty beyond that required by the "physical impact" test to include not only those who sustain a physical impact as a result of the negligent conduct but also those who were placed in immediate risk of physical harm by that conduct. That test, however, does not allow recovery for mere exposure to a substance that may be harmful.

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[2] *Schweitzer v. Consolidated Rail Corp., 758 F.2d 936, 942 (3rd Cir.) cert. denied, 474 U.S. 864 (1985); Ball v. Joy Technologies, Inc., 958 F.2d 36, 38 (4th Cir. 1991) ("The mere exposure of the plaintiffs to toxic chemicals does not provide the requisite physical injury to entitle the plaintiffs to recover for this emotional distress) cert. denied, 502 U.S. 1033 (1992); Bubash v. Philadelphia Elec. Co., 717 F.Supp. 297, 300 (M.D.Pa. 1989); Friedman v. F. E. Myers Co., 706 F.Supp. 376, 381 (E.D.Pa. 1989) ("[i]n the absence of any evidence beyond mere exposure, the court finds that (plaintiffs) claims for [negligent infliction of] emotional distress cannot stand").*

1. THE "ZONE OF DANGER" IS CIRCUMSCRIBED BY PHYSICAL AND TEMPORAL PROXIMITIES.

The "zone of danger" test delimits the duty to avoid infliction of emotional distress by circumscribing both the physical area within which an injured party must be located and the temporal area within which the injured party must experience the shock from which the emotional injury flows. These areas establish foreseeability of victim and harm to aid in the recognition of duty and liability.

The "zone" within which the plaintiff must be located is defined by physical and temporal proximity. The injured party must be in a physical area where the average person could foresee that his or her negligence places another in danger of immediate physical harm. Thus, the average individual can assess the scope of his or her duty and to whom it is owed.

The "zone" is also bounded by the time during which a party experiences the cause of his or her emotional distress. The plaintiff must contemporaneously experience a reasonable apprehension of the physical impact from which a foreseeable emotional injury arises. *Camper v. Minor,* 915 S.W.2d 437, 442 (Tenn. 1996)(citations omitted); *Gottshall,* 114 S.Ct. at 2411 ("Railroad employees thus will be able to recover for injuries-physical and emotional-caused by the negligent conduct of their employers that threatens them imminently with physical impact." (emphasis added)). "Subsequent brooding" over the exposure to a risk of physical harm is insufficient.[3] RESTATEMENT (SECOND) OF TORTS 436 cmt. c (1965). The next obvious question to address is whether the plaintiff actually experienced a "reasonable apprehension."

2. THE EMOTIONAL INJURY MUST STEM FROM A "SHOCK" OR "FRIGHT."

Like the physical and temporal limits of the "zone," the reasonableness of the apprehension must be interpreted in light of the policies underlying the adoption of the "zone of danger" test. When jurisdictions first adopted the "zone of danger" test to replace the stringent "physical impact" test, they did so based on the general observation that "fright or shock is a link in the chain of proximate causation as efficient as physical impact from which like results flow." *Pankopf v. Hinkley*, 141 Wis. 146, 123 N.W. 625,

[3] *The Restatement recognizes that some situations exist where negligence creates a long continued peril. Mental injury resulting from such situations must be caused by the cumulative effects of the anxiety over the constant subjection to a peril. Restatement (Second) of Torts 436 cmt. c (1965).*

627 (1909)(emphasis added).[4] According to these jurisdictions, "fright" and "shock" were the type of "reasonable apprehensions" which cause actionable emotional distress. These jurisdictions did not arbitrarily choose the terms "fright" and "shock" as opposed to "fear" or "apprehension."

Fear and apprehension are unpleasant, but commonplace experiences.[5] Fright and shock, on the other hand, are occurrences "as efficient" as an actionable physical impact; they are usually more sudden and finite than fear and apprehension, and thus, less likely to impose unlimited liability.

The requirement of an immediate "fright" or a "shock" is supported by rulings of courts employing the "zone of danger" test today, even those extreme examples cited by the Second Circuit. Those cases, while ignoring the "near miss" requirement, at least recognized the "fright" or "shock" requirement. For example, in Marchica v. Long Island Railroad Co., 31 F.3d 1197 (2nd Cir. 1994), cert. denied, 115 S.Ct. 727 (1995), which the Second Circuit cited as being inapposite to its ruling in *Buckley v. Metro-North Commuter R.R.*, the plaintiff was stabbed by a hypodermic needle found in an area which he knew was frequented by prostitutes, drug users, and illegal aliens. *Marchica,* 31 F.3d at 1200. Immediately after he was stabbed, plaintiff went to the nearest hospital and received hepatitis and tetanus shots. Id. He also underwent an HIV test and was told not to have relations with his wife. Id. a 1200-1201.

[4] *See, e.g., the cases cited in Gottshall, 114 S.Ct. at 2406, n.8, as having adopted the "zone of danger" test when FELA was enacted: Simone v. Rhode Island, 28 R.I. 186, 66 A. 202, 208 (1907)("It is a matter of general knowledge that an attack of sudden fright or an exposure to imminent peril has produced in individuals a complete change in their nervous system, and rendered one who was physically strong and vigorous weak and timid.")(emphasis added); Kimberly v. Howland, 143 N.C. 398, 55 S.E. 778, 780 (1906) (a "negligent tort so terribly frightened a person as to cause death or leave him through life a suffering and helpless wreck...")(emphasis added); Gulf, C. & S.F. R. Co. v. Hayler, 93 Tex. 239, 54 S.W. 944, 945 (1900)("Where an injury "results from a fright or other mental shock... the injured party is entitled to recover...")(emphasis added); Mack v. South-Bound R. Co., 52 S.C. 323, 29 S.E. 905, 909 (1898)("It is a matter of general knowledge that an attack of sudden fright, or an exposure to imminent peril, has produced in individuals a complete change in their nervous system...")(quoting Sloane v. Ry. Co., 44 Pac. 322 (Cal.))(emphasis added); Stewart v. Arkansas Southern R. Co., 112 La. 764, 36 So. 676, 677 (1904)(rejecting jurisdictions which disallow recovery for fright without an initial injury); Watson v. Dilts, 116 Iowa 249, 89 N.W. 1068, 1069 (1902)("It is within the common observation of all that fright may, and usually does, affect the nervous system,... and that an entirely sound body is never found with a diseased nervous organization.")(emphasis added).*

[5] *"Fear," as defined by Merriam Webster's Collegiate Dictionary 425 (10th ed. 1995), is "an unpleasant often strong emotion caused by anticipation or awareness of danger." Webster's goes on to compare "fear" to "fright" by stating, "FRIGHT implies the shock of sudden, startling fear. . ." (emphasis in original).*

"Apprehension" is "suspicion or fear especially of future evil." Webster's Collegiate Dictionary 57 (10th ed. 1995).

In Hagerty v. L.&L. Marine Services, Inc., 788 F.2d 315 (5th Cir. 1986), *modified* 797 F.2d 256 (1986), a tanker man was soaked with chemicals whose characteristics the tanker man had previously studied, and he knew them to be carcinogenic. Hagerty, 788 F.2d at 318-19. After *Hagerty* had "watched Benzine absorb into his finger," *id.* at 319, he "doused his clothes and shoes with water immediately and then removed the clothes and took a shower." Id. at 317.[6]

Each of these plaintiffs immediately recognized the potential harm when they were exposed to it. They may have experienced a general fear of possibly being stabbed by a hypodermic needle or possibly being soaked with carcinogenic chemicals, but they experienced a shock or fright when that fear was realized and they actually were stabbed with a needle and soaked with carcinogenic chemicals. Shock and fright compelled them to take precautions to prevent further harm and to seek medical treatment. Shock and fright were Marchica's and Hagerty's "reasonable apprehension" which was discernible through not only their knowledge of their particular predicament, but also their responsive actions.

B. EXPOSURE TO ASBESTOS DOES NOT PLACE AN INDIVIDUAL WITHIN A FORESEEABLE "ZONE OF DANGER."

Mere exposure to a substance, though potentially harmful, is not an immediate threat of physical harm. Because all air contains some asbestos fibers, (and practically everyone is exposed to some potentially harmful substance on almost a daily basis) physical injury from asbestos and other substances may develop from repeated exposure to high concentrations and allegedly takes years to manifest itself. Therefore, asbestos exposure never poses immediate physical harm or a "near miss."

The physical and temporal limits necessary to establish a true threat of physical injury from substance exposure are broader than any "zone of danger" originally envisioned by the common law. The "personal aura" of danger would create unlimited liability for potential defendants.

Here, the plaintiff alleges that the exposure to asbestos at his workplace created a "zone of danger." However, the plaintiff has never alleged that, while within the "zone" he experienced shock, fright, or any other reasonable apprehension of the inhalation of asbestos fibers. Indeed, after learning of the identity and allegedly potentially harmful nature of the white,

[6] *The Second Circuit also cites Lavelle v. Owens-Corning Fiberglas Corp., 30 Ohio Misc.2d 11, 507 N.E.2d 476 (Com.Pl. 1987) as "inapposite" to its ruling. Buckley, 79 F.3d at 1345. However, unlike the plaintiffs in Hagerty and Marchica, and in this case, the plaintiff in Lavelle had a permanent physical injury - he was afflicted with asbestosis.*

powdery insulation material, the plaintiff continued to remove it, even though he could have transferred to another job. The plaintiff was not shocked or frightened by his alleged exposure to harm while in the "zone of danger." Presumably, a reasonable person would avoid a known "zone of danger." The plaintiff, on the other hand, returned to the alleged "zone." His alleged emotional distress did not result from a "reasonable apprehension" of immediate physical harm within a "zone of danger."

The plaintiff's alleged emotional distress arose after his exposure, after his learning of the alleged physical harm asbestos might cause, and after he voluntarily re-exposed himself to asbestos. His alleged emotional distress results not from shock or fright contemporaneous to his exposure, but "subsequent brooding" over the admitted negligence of the defendants. His alleged emotional injury is outside the physical and temporal limits of the foreseeable "zone of danger," and therefore, the test cannot impose liability against the defendants.

II. THIS COURT SHOULD RECOGNIZE COMMON LAW MINIMUM STANDARDS FOR SCRUTINIZING EMOTIONAL INJURY CLAIMS

The Second Circuit, in its application of the "zone of danger" test adopted by this Court in *Gottshall,* failed to impose any of the common law standards with which to test the validity of emotional injury claims. This Court should not allow the Second Circuit's decision to stand and should adhere to common law minimum standards for scrutinizing negligent infliction of emotional distress claims.

When this Court in *Gottshall,* adopted the "zone of danger" test, it noted several concerns stemming from emotional distress claims potentially creating "infinite liability" to an "infinite number of persons." *Gottshall,* 114 S.Ct. at 2408-2409 and 2411. Because it is more difficult to predict the existence and degree of mental injury, any number of people may suffer emotional distress which "may occur far removed in time and space from the negligent conduct..." *Id.* at 2405. *Id.* In short, the *Gottshall* Court's concerns were based on the difficulty in determining *who* suffers *compensable* mental suffering.

Based on these same concerns, "[t]he common law consistently has sought to place limits on this potential liability by restricting the class of plaintiffs *who* may recover and the *types* of harm for which plaintiffs may

recover.'"[7] *Id.* at 2405 (emphasis added). Through its adoption of the "zone of danger" test, *Gottshall* followed the common law tradition by placing limitations on those who may recover,[7] but the opinion of the Second Circuit in this case demonstrates that this Court should go further.

By narrowly defining who can bring a mental injury claim, the "zone of danger" test resolves the common law's and *Gottshall's* concerns over such claims creating an "unlimited number" of potential plaintiffs, but because the Court failed to define which mental injuries are compensable, the "zone of danger" test was interpreted by the Second Circuit to allow a plaintiff to recover for any injury, no matter how trivial. *Buckley v. Metro-North Commuter Railroad*, 79 F.3d 1337 (2nd Cir. 1996) (holding that a plaintiff may recover for pure emotional injuries with no accompanying physical injury or objective proof of the mental injury). The "zone of danger" test dams the "veritable flood of litigation," but its failure to establish a standard for compensable mental distress creates substantial "cracks."

These "cracks" of potentially "unlimited liability" are caused by the difficulty in determining the existence and the extent of emotional distress. An individual may genuinely, but wrongly, believe that he or she suffers mental injury as a result of an act of negligence. *Payton v. Abbott Labs.*, 386 Mass. 540, 546, 437 N.E.2d 171, 175 (1981). Recognizing the ability of the human mind to play tricks upon itself, as easily as people are able to deceive one another, courts "continue to rely upon traditional indicia of harm to provide objective evidence that a plaintiff actually has suffered mental distress." *Id.* It is not, and cannot be, the law that one is liable in damages to anyone whose mental tranquility might foreseeably be disturbed by a negligent act. This Court should continue to adhere to the common law and its traditional indicia of harm.

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7 Although courts have begun to recognize claims for negligent infliction of emotional distress, "concerns over the possibility of a flood of litigation and the need to limit liability in proportion to the defendant's culpability led courts to develop threshold tests to determine the validity of claims for emotional distress." J. Mark Appleberry, Negligent Infliction of Emotional Distress, 21 Am.J.L.&Med. 301 (1995) (examining the current state of the law governing negligent infliction of emotional distress claims).

The common law has undergone significant upheaval in recent years with respect to claims for negligent infliction of emotional distress.[8] Many courts have abandoned the traditional tests of requiring "physical impact" [9] or that the plaintiff be in the "zone of danger." Some of the more liberal tests are known by a variety of names, such as "foreseeability"[10] and "general negligence."[11] Many different names and methods of limiting these claims exist, but the purpose remains the same.[12] However the test is formulated in a specific jurisdiction, the fundamental, overriding concern among the courts is that there must be some minimum standard for recovery of purely emotional distress claims where there is no physical injury. *See, e.g., R.J. v. Humana of Florida, Inc.*, 652 So. 2d 360 (Fla. 1995); *Hammond v. Central Lane Communications Ctr.*, 312 Ore. 17, 816 P. 2d 593 (1991); *Ob-Gyn Assc's of Albany v. Littleton*, 259 Ga. 663, 386 S.E. 2d 146 (1989); *Garrison v. Medical Ctr. of Delaware*, 581 A. 2d 288 (Del. 1988); *Deutsch v. Shein*, 597 S.W.2d 141 (Ky. 1980).

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8 Legal scholars addressing the issue state, "the case law in the field [of negligent infliction of emotional distress] is in an almost unparalleled state of confusion." Leslie Benton Sandor & Carol Berry, Recovery for Negligent Infliction of Emotional Distress Attendant to Economic Loss: A Reassessment, 37 Ariz. L. Rev. 1247, 1249 (1995).

9 According to John L. Ropiequet, "Due to judicial stretching of the physical impact or injury requirement, its practical effect in many jurisdictions is virtually meaningless." John L. Ropiequet, Emotional Distress Claims in Medical Malpractice Cases, For the Defense, April 1990 13, 13.

10 The "foreseeability" approach or "relative bystander" test was first utilized by the California Supreme Court in Dillon v. Legg, 441 P.2d 912 (1968). After the Dillon ruling, the California courts began to experiment with the ruling and to expand liability. Finally, the California Supreme Court "put an abrupt halt to expansive readings of the Dillon rule in Thing v. La Chusa, 48 Cal. 3d 644, 257 Cal. Rptr. 865 (1989), ending 20 years of experiments and disagreement in the lower courts by returning to a literal reading of the elements set forth in Dillon." John L. Ropiequet, Emotional Distress Claims in Medical Malpractice Cases, For the Defense, April 1990 13, 18. The Thing Court "drew what it admitted were arbitrary lines to limit liability and establish firm rules by changing Dillon's guidelines' into positive rules of law." Id. The significance of this reversion back towards a more conservative approach is that California retreated away from a liberal, expansive view of emotional tort liability. The California courts' search for concrete guidelines demonstrates the need for substantial certainty in the law of negligent infliction of emotional distress.

11 The most recent jurisdiction to address this issue is the State of Tennessee. Upon surveying the law and addressing the significant policy concerns, the Tennessee Supreme Court recently adopted a "general negligence" approach towards these types of claims. Camper v. Minor, 915 S.W.2d 437 (Tenn. 1996).

12 Courts have addressed the substantial public policy concerns stemming from these types of cases. For example, in Ball v. Joy Technologies, Inc., 958 F.2d 36 (4th Cir. 1991), the Fourth Circuit affirmed the district court's grant of the defendant's motion for summary judgment, finding that the "plaintiffs had not sustained any

Because the more liberal tests create substantial "cracks" in the dam of the "veritable flood of litigation," most jurisdictions impose additional standards with respect to the types of emotional injury which may be compensated. Many that follow the "zone of danger" or "relative bystander" tests also require that a plaintiff demonstrate "physical manifestation" of an alleged emotional injury, that is, a physical injury or effect that is the direct result of an emotional injury, in order to recover. *Gottshall,* 114 S.Ct. at 2407, n. 11 (citing *Garvis v. Employers Mut. Casualty Co.,* 497 N.W.2d 254 (Minn. 1993)).

Other courts, even the courts that have expanded to the broadest and most undefinable "general negligence" approach, have recognized the requirements that the emotional injury be "serious" or "severe." *Camper v. Minor,* 915 S.W.2d 437 (Tenn. 1996); *Burgess v. Superior Court,* 2 Cal. 4th 1064, 831 P.2d at 1197, 1200 (1992); *Shultz v. Barber Glass Co.,* 4th Ohio St.3d 131, 447 N.E.2d at 109, 113 (1983) ("we hold that a cause of action may be stated for the negligent infliction of serious emotional disturbance without a contemporaneous injury"); *St. Elizabeth Hosp. V. Garrard,* 730 S.W.2d 649, 653 (Tex. 1987) (stating that "freedom from severe emotional distress is an interest which the law should serve to protect.") The reason for these standards for compensable mental injury "is to guard against the litigation of trivial or fraudulent claims." *Burgess,* 831 P.2d at 1200, n. 6.

The Second Circuit's decision represents a relaxation of the traditional standards of tort liability and an expansion of liability for negligent infliction of emotional distress.[13] The Second Circuit analysis uses no minimum standards to test the genuineness of alleged negligent infliction of emotional distress claims. It is submitted that the Second Circuit's decision, if allowed to stand, will be relied upon by untold numbers of future litigants in FELA, Jones Act, products liability, toxic tort and other common law cases for its expansive holding and the dangerous precedent it sets. The Second Circuit's decision demonstrates that this Court should hold that the law provides minimum standards for testing the genuineness of such claims and recognize the common law requirements.[14]

A. THERE SHOULD BE A REQUIREMENT OF SOME PHYSICAL MANIFESTATION OF THE DISTRESS

The interests of justice require adoption of a bright-line rule establishing the standard for compensating mental injuries. The "genuineness" of the claim can best be addressed by the physical manifestation requirement.[15] Emotional distress without physical consequence is unlikely to be serious and, more probably, is "so temporary, so evanescent, and so relatively harmless and unimportant, that the task of compensating for it would unduly burden the courts and the defendants." RESTATEMENT (SECOND) OF TORTS 436A cmt.b (1965). Moreover, emotional distress is easily imagined and feigned. The modern medical community has long accepted the correlation

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physical injury from their exposure to toxic chemicals and having suffered no physical injury, the common law of West Virginia and Virginia would not allow them to recover damages for emotional distress or the costs of medical surveillance." Id. At 37. The district court emphasized the policy considerations behind its decision:

> *There is little doubt that millions of people have suffered exposure to hazardous substances. Obviously, allowing individuals who have not suffered any demonstrable injury from such exposure to recover the cost of future or medical monitoring in a civil action could potentially devastate the court system as well as defendants. Again, this is not to say that defendants who have caused such exposure should not pay the price. Certainly, theoretically both justice and common sense dictate that they should, however, practically there must be a realization that such defendants' pockets or bank accounts do not contain infinite resources. Allowing today's generation of exposed but uninjured plaintiffs to recover may lead to tomorrow's generation of exposed and injured plaintiffs being remediless. Thus, to prevent one injustice from arising from another, the finite resources available must be spent both cautiously and wisely. This basic dilemma has plagued tort law since its inception. Because of it, lines, sometimes arbitrary, have been drawn, and will continue to be drawn, to limit and delineate the whens and ifs individuals will be allowed recovery for a wrong committed against them.*
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> *Ball v. Joy Technologies, 755 F. Supp. 1344, 1372 (S.D.W.Va. 1990).*

[13] *According to the Restatement, "If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance." Restatement (Second) Torts 436A (1965) (emphasis added).*

[14] *For example, James F. Early, a partner in New Haven's Early, Ludwick & Sweeney which handles similar cases, recently stated, "what is significant about this case is that you may be able to bring a lawsuit at an earlier date, rather than waiting until you have some objective evidence in the form of an x-ray, a breathing test, before the actual physical manifestation." Steven Fromm, supra, note 1. The potential for future litigants to be able to bring a lawsuit without possessing any objective evidence of the claim is a frightening proposition for our judicial system.*

[15] *The courts in many jurisdictions require emotional distress to be physically manifested in order to be compensable. See Towns v. Anderson, 195 Colo. 517 (1978) (en banc) (physical manifestations or mental illness); Barnhill v. Davis, 300 N.W.2d 104 (Iowa 1981) (bystander case); Vicnire v. Ford Motor Co., 401 A.2d 148, 155 (Me. 1979) (illness or bodily harm "substantial and manifested by objective symptomology"); Vance v. Vance, 388 Md. 490, 500 (1979) ("capable of objective determination"); Corso v. Merrill, 119 N.H. 647, 653 (1979) (bystander case) (physical symptoms . . . susceptible to some form of objective medical determination and proved through medical witnesses").*

between mental illness and physical manifestations.[16] RESTATEMENT (SECOND) OF TORTS 436A cmt.b (1965). Finally, negligence is not so great a fault as to require the imposition of liability for purely mental injury. RESTATEMENT (SECOND) OF TORTS 436A cmt.b (1965).

Undoubtedly, there will be cases where serious mental injury is not accompanied by physical harm, but these are in the minority. *Payton v. Abbott Labs.*, 386 Mass. 540, 555, 437 N.E.2d 171, 180 (1981). Allowing recovery simply because these cases exist is not rational or justifiable. Id. at 556, 180. Emotional distress without physical manifestation is not a reasonably foreseeable consequence of mere negligence. *Id.* Courts must refrain from burdening the judicial system and potential defendants with claims which are "trivial, evanescent, temporary, feigned, or imagined, in order to insure that occasional claims of a more serious nature receive judicial resolution." *Id.* To avoid imposing such a burden, courts should require that plaintiffs corroborate their mental distress claims with objective evidence. The best objective evidence is physical manifestation, supported by medical proof of causation.

B. THE PLAINTIFF'S EMOTIONAL DISTRESS MUST BE SEVERE

Even courts adopting the most liberal and non-traditional approaches which do not require physical manifestation of the emotional injury have maintained the requirement that the plaintiff's distress be severe. *See e.g., Camper v. Minor,* 915 S.W.2d 437 (Tenn. 1996). For example, the Tennessee Supreme Court found that "in order to guard against trivial or fraudulent actions, the law ought to provide the recovery only for 'serious' or 'severe' emotional injury." Id. (following *Burgess v. Superior Court* (Gupta), 2 Cal. 4th 1064, 831 P.2d 1197, 1200 (1991); *St. Elizabeth Hosp. v. Garrard,* 730 S.W.2d 649, 653 (Tex. 1987)). A "serious" or "severe" emotional injury occurs "where a reasonable person, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." *Rodrigues v. State,* 472 P.2d 509, 520 (Haw. 1960); *Paugh v. Hanks,* 6 Ohio St. 3d 72, 451 N.E.2d 759, 765 (Ohio 1983); Plaisance v. Texaco, Inc., 937 F.2d 1004, 1010 (5th Cir. 1991); W. PROSSER AND W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS, 54, at 364-65, n. 60.

16 Leslie Benton Sandor and Carol Berry, Recovery for Negligent Infliction of Emotional Distress Attendant to Economic Loss, 37 Ariz. L. Rev. 1247, 1254 (citing Nancy Levit, Etherial Torts, 61 Geo. Wash. L. Rev. 136, 184-88 (1995), (citing studies to support the proposition that psychological stress induces physical changes, and plays a role in the onset of disease)).

In the case before the Court, the Plaintiff provided no objective evidence that he suffered severe emotional distress. *Buckley v. Metro-North Commuter Railroad,* 1995 WL 110380 (S.D.N.Y. 1995). The district court properly noted that "[d]espite the emotional distress plaintiff claims, he continued working in the Grand Central Terminal even though it is undisputed that he could have transferred to any one of several asbestos-free facilities where both he and his father had previously worked." *Id.* at *3. The district court also pointed out that "even after being warned by a doctor and viewing the videotape about smoking, plaintiff continued to smoke cigarettes whenever I feel like having one.'" *Id.* These facts by no means demonstrate a person suffering from emotional distress severe enough to have a tort claim where there is no accompanying physical injury. The Second Circuit's decision allowing such a tenuous claim in this test case for 140 other plaintiffs should not be allowed to stand as precedent.

C. THE PLAINTIFF MUST PROVIDE MEDICAL PROOF OF THE DISTRESS

This Court should adhere to the traditional common law requirement that the plaintiff provide medical proof or scientific proof of the injury. The common law has steadfastly required medical or scientific proof that the injury was caused by the event as well as the extent and permanency of the injury.[17] The requirement for medical proof not only provides causal connection, it also provides some objective measure of the genuineness and extent of the injury.

In addition, the requirement for medical evidence allows the defendant to test the validity of the plaintiff's complaint and helps the court ferret out nonmeritorious claims. *Paugh v. Hanks,* 451 N.E.2d 759, 767 (Ohio 1983) ("Expert medical testimony can assist the judicial process in determining whether the emotional injury is indeed serious.")

Even courts adopting the most liberal approaches have maintained the requirement that the claimed injury must be supported by expert medical or scientific proof. See *Camper v. Minor,* 915 S.W.2d 437, 446 (Tenn. 1996) ("Finally we conclude that the claimed injury must be supported by expert medical or scientific proof."); *Leong v. Takasaki,* 55 Haw. 398, 520 P.2d 758, 766-67 (Haw. 1974) ("[t]he plaintiff should be permitted to prove medically the damages occasioned by his mental responses to defendant's negligent act."). As pointed out in Justice Ginsburg's dissent in *Gottshall,* one "solution to this problem - a solution the Court does not explore - would be

17 For earlier courts, "harm" was "distress serious enough to require medical attention." Negligence and the Infliction of Emotion Harm: A Reappraisal of the Nervous Shock Cases, 35 U. Of Chicago L. Rev. 512, 517 (1968).

to require such 'objective medical proof' and to exclude as too insubstantial 'injury' claims lacking this proof. *Gottshall,* 114 S.Ct. at 2418 (Ginsburg, J., dissenting).

In the present case, the Plaintiff offered no medical testimony or any testimony other than his own to support his alleged emotional distress claim. In fact, the medical proof is to the contrary. The medical proof by the physician who examined the plaintiff was that the plaintiff did not display the level of concern worth even considering the need for counseling. *Buckley v. Metro North Commuter Railroad,* 1995 WL 110380 (S.D.N.Y. 1995).

CONCLUSION

Certain safeguards should be firmly established to protect against the "specter of unlimited and unpredictable liability" as this Court described the potential effect on American tort law in *Gottshall. Gottshall,* 114 S.Ct. at 2411. The Second Circuit's ruling which allows a plaintiff to enter the courthouse doors with an alleged emotional distress claim without the common law requirements of being within the "zone of danger" and without any physical manifestation and evidence of the severity of the claim or medical proof to support the claim, discards all of the important limitations placed by this Court on the class of plaintiffs that may recover for emotional injuries. *Id.* at 2405. Maintaining the common law requirements of the zone of danger test and that the emotional injury be serious or severe and established by medical or scientific proof provide objective criteria permitting defendants to test the validity and extent of the injury for which they may be liable. It will also prevent a flood of potential claims based solely upon the plaintiff's subjective complaints resulting from allegations of mere exposure to some potentially harmful substance.

Accordingly, *Amici Curiae,* the Defense Research Institute and the National Association of Manufacturers, respectfully submit that the decision of the Second Circuit should be reversed. The Court should take this opportunity to recognize established common requirements imposed to place rational limits on recovery for negligent infliction of emotional distress and provide guidance to the lower courts.

Respectfully submitted,

James M. Doran, Jr.(#2638)
Counsel of Record
Mark S. LeVan
E. Frances Coughlin
Sarah C. Hardison
MANIER, HEROD, HOLLABAUGH & SMITH
First Union Tower, Suite 2200
150 Fourth Avenue North
Nashville, Tennessee 37219-2494
(615) 244-0030

Attorneys for Amici Curiae
Defense Research Institute and
National Association of Manufacturers

OF COUNSEL:

Jan S. Amundson
General Counsel
Quentin Riegel
Deputy General Counsel
National Association of Manufacturers
1331 Pennsylvania Avenue, NW
Suite 1500—North Lobby
Washington, DC 20004-1790
(202) 637-3000